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Legal and Extralegal Factors Influencing Judge's Penal Decisions

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Abstract

The current study aims to identify legal and extralegal factors that might influence judges' penal decision in criminal cases. At the same time, it intends to determine how the imposed penalties effect on prisons overcrowding, on ensuring public safety protection, as well as on solving related problems faced by offenders. Our study showed that judges perceive the decision process as being mainly based on a rational approach, minimizing or even denying an external influence from extralegal factors, while being interested in accessing personal data like offender's personality, psychosocial identity, education or economic status. Hence, our study may represent a starting point for exploring the mechanism underlying judicial decision, as a prerequisite for improving sentence's predictability.

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1. Introduction

In judicial context tackling a specific decision is a complex process taking into account organizational context and procedural regulations, this decision representing the last act of trial. Decisional process is a process that facilitates the involvement of an individual into a specific action (Mintzberg, 1979, a solving problems process (Mac Crimmon & Taylor, 1976). Starting with some observations of Rowe and Mason (1987), we state that judge's decision may be defined as an intellectual activity involving a social actor (judge) that choose into the deliberation process a solution into a specific case. This solution is a result of a rigorous and complex logical reasoning. The decision process of magistrates must be a predictable one in order to be avoided some discretionary punishment (harsh punishment for some offences with a low degree of social danger or soft punishments for serious offences). Judges must to observe the social and economic impact of the sentence. The magistrates must to be focused not only on the impact of the sentence in relation with the offender but also to consider some specific aspects such the costs of the punishment, the impact of sentence on other persons or on community members. In last decades in some countries (United States, United Kingdom) a special attention is given to

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sentencing process, being elaborated sentencing guidelines in order to make the decision process more predictable.

The sentencing process in Romania

The decision process was analyzed (Drobak & North C. Douglass, 2008) in last decades, being noticed some distinct types of decisions (individual and organizational decisions, intrapersonal and interpersonal decisions, programmed and innovative decision, intuitive and analytical decisions etc.) Traditionally, the judges' decisions mechanism was described as a rational one, based on elements exclusively provided by law. For example, art. 72 align. 1 of Romanian Penal Code states that judges must take into account around the sentencing process factors such punishment's limits as provided in this code, dangerousness of the offense, offender's personality, mitigation or aggravating factors. Under these circumstances, the decision process was described as a chain of logical arguments to a conclusion, as it happens in mathematics (Drobak, 2008). Nevertheless, this legal formalism began to be criticized starting with the begging of XX century, when some researches and observations proved that decision process is deeply influenced by some extralegal factors (social, psychological, economic and even physiological factors).

Extralegal factors impacting on judges decision

Recent studies (Siegel & Bartollas, 2011) reveals that judges are influenced by some factors as *social class* (sometimes persons from lower classes are convicted to harsh punishments comparing with high class offenders), *gender* (reflected in sentences regarding sex based discrimination or equality between men and women where females judge tend to adopt liberal positions) (Siegel, 2011). Also female judges tend to punish harsher sex offenders comparing with male judges (O' Connor, 2010). Another relevant factor with impact on decision may be represented by the overwhelming activity of judges, as it is proved that the magistrates from courts with a small number of cases applies harsher punishments (Siegel, 2011). Last but not least, factors as time may have a significant impact on decision, in the context where some studies shows that exists some differences between sentences imposed before or after lunch (Danziger, 2011).

Some researches (for instance, Oancea 2012) show that judges tend to use in punishment individualization process in a consistent manner pre-sentence reports (PSR) from the probation service. In accordance with provisions of Government Ordinance no. 92/2000, the pre-sentence report presents data regarding social context of the offenders, educational and professional background, an analysis of offence, problems related with addictions etc. Also, the pre-sentence report provides an assessment regarding the specificity of rehabilitation process of the offenders on a short, medium and long time perspective, being underlined the personal potential for change of the offenders (motivation) and mentioned other relevant resources who can be involved (family, public/private institutions from community etc.). This report is a confidential document prepared by probation service at the request of magistrates (judges and prosecutors) for some specific categories of offenders, and aims to provide relevant information regarding the personality of the offender.

2. Study objectives and basic assumptions

Given the above, our exploratory study aims to look at how judges in a number of court instances in Bucharest are aware of the impact of extralegal factors (socio-demographic, psychological, institutional, personal, etc..) on the decisions they take. Hence, several objectives were defined for our study: (1) analyzing legal† (social, demographical, psychological, personal etc.) and extralegal factors (mass media, public opinion, personal experiences) that may influence judges' decision; (2) determine the extent the magistrates take into account the

†Legal factors are set out into normative framework regarding punishment's individualization. Some factors related with offender's personals issues (education, social environment, professional background, addictions etc.) are presented to the court through documents such social inquiry reports prepared by probation service.

institutional impact of sentence (for example, prisons overcrowding), its impact on the public safety and the extent it cover some criminological needs of the offender in order to facilitate the rehabilitation process.

Moreover, several assumptions are underlying our current study: (1) judges tend to be focused more on legal factors in sentencing process; (2) extralegal factors have a low impact on this process; (3) judges are not concerned by the impact of sentences on other organizations (prisons) but are interested to find the effective methods for offenders' rehabilitation.

3. Participants

The subjects recruited of this study were 49 judges based in Bucharest: among them, 23 were magistrates in the sector courts, 16 in the central court (tribunal) and 7 in the appeal courts. Also, 3 of the subjects in the sample did not fill in information regarding their jurisdiction level. Anonymity was guaranteed during the entire process, and no names or other identifying data were gathered at any time.

4. Instruments and measures

Data were collected using a self-administrated questionnaire targeted on five dimensions: (a) assessment report (social inquiry report), (b) community supervision, (c) the impact of the New Penal Code, (d) juvenile justice and (e) structured programs in working with offenders, and the subsequent cooperation between the local Probation Service and the local courts from Bucharest (sector courts, tribunal and appeal court). Within the above mentioned dimensions, there are a number of variables which may influence the decision, covering issues as: the judge personal experience, extralegal factors (public opinion, mass-media, socio-demographic factors, institutional issues, etc) or alternative sanctions to allow rehabilitation of prisoners. Subsequently we organized a focus group and interviewed 5 judges (4 judges from sector courts and 1 judge from tribunal) in order to clarify some answers and to obtain more in-depth information regarding the questionnaire' collected data.

5. Results

5.1. *The usefulness of social inquiry report*

Descriptive analyses revealed that 34 judges (64,9%) showed a total agreement, while 12 judges (24,5%) expressed a partial one in regards of the *usefulness* of social inquiry report (that provides data in relation with data on socio-demographic aspects, professional, health and addiction issues of offenders etc.) in the process of individualization of punishments. None of the judges in the investigated sample expressed a complete or partial disagreement regarding the utility of this report in individualization process (Objective 1). Subsequent in-depth interviews the judges validated previous observations, emphasizing the importance of reports stating that the information about the personality of the offender is essential in individualization process (Assumption 1).

5.2. *The role of the personal experiences in magistrate decision*

Taking into account the multitude of extralegal factors influencing judge's decision and some observation from literature (Mackenzie, 2005; Posner, 2008; Wrightsman, 1999) we focused our research on some specific issues as public and mass media pressure and personal experiences of magistrate as factors holding a potential influence on their decisions. Regarding the impact of personal experiences on decision process, 21 judges (42, 9%) stated that this never happened, while 11 (22,4%) stated that this can happen seldom and 6 (12,24%) answered sometime (Objective 1).

We must note that this issue generically labeled personal experiences is an extensive one including professional (for example a relevant experience in other law activities – lawyer) and personal (age, life experience, previous victimization experiences) aspects. More than this, personal experiences are very important if we take into account their impact on personality development (Askew & Carnell, 1998; Beckett & Hager, 2002). In such circumstances, judge's opinion regarding the non-interference of personal experiences into decision process is quite paradoxical (Assumption 2). Subsequent interviews revealed an evident trend to limit the meaning of *personal experiences*. In this way, many judges associate *personal experiences* with some experiences when they were victims of crimes or antisocial behavior. Also, during the interviews judges have tried to separate into an obvious manner personal and professional life. They described decisional process being a rational one, based only on evidences from penal file, excluding a possible interference of personal experience.

5.3. Mass media and public opinion

In terms of the potential pressure from mass media or public opinion impacting on judges decision (Objective 1), 42,9% of the questioned judges states that none of these factors might significantly impacted on the decision process. However, 22,4% of the subjects admitted that seldom a such influence may appear, while 3 of them (6,12%) say such an influence might happen sometime (Assumption 2). During the interviews, judges explained that such pressure may appear in some important cases, that are over-reported in mass media. Nevertheless, taking into account the specificity of jurisdictional procedures from Romania a such interest/pressure from public opinion/mass media is a short-term one (for example when the file is transferred from prosecutor office to court or when the court pronounce the sentence).

On the other hand, some judges think that the pressure from mass media may be more consistent in early stages of penal investigation in some serious crimes (murders, sexual offences etc.) when mass media initiates some debates regarding the efficiency of police activity or the circumstances which facilitated crimes. Mass media is not concerned on specific procedures during the penal trial than being more interested on solutions (length of sentence). In such context the pressure may occur after sentencing, when this is a controversial one (exoneration).

Regarding public opinion (Objective 1) subjects considered that this type of pressure is not felt directly (Assumption 2). Judges take into account the impact of sentence, being interested on the exemplarity of conviction. Thus, they are focused on sending to public opinion some messages regarding the respecting criminal law. Some remarks made on impact of mass media on decision process are also applicable for public opinion (for example, a high degree of interest is shown in early stages of penal procedures). Analyzing the literature (Boehme-Nessler, 2011; Harris, 2009; Surette, 2011) we can state that, some of the important vectors that might facilitate these kinds of pressure, are still absent in Romania. For example in some countries, there are established TV channels focused especially on justice issues (Court TV – in United States of America) or very active NGO in victims' protection. Another important aspect is represented by the specific of Romanian jurisdictional procedures, especially in serious crimes when the trial can take few years. In such circumstances the interest of mass media/public opinion gradually decreases. Present study also revealed a sequential approach of penal process, between penal trial and executional stage.

5.4. The impact of sentences on prison system

We found that magistrates are not interested about the impact of sentences they pronounce on the prison system. Thus, a phenomenon like prisons overcrowding is not seen as a direct result of sentencing (Objective 2). 28 subjects (57,1%) stated that they have never took into account prison overcrowding when they decided a custodial sentence (Assumption 3). This practice is contrary to some aspects described in literature (Kuhn, 1994) and international recommendations who mention as a possible cause of overcrowding a too punitive sentencing

policy of courts. In order to avoid some unnecessary expenses in prisons' infrastructure is very important to have a rational approach, to apply custodial sanctions in accordance with offender's risk. International recommendations emphasize the importance of community sanctions and parole system in order to solve the overcrowding problem. They also state the necessity to create a predictable punishment system to reduce the arbitrary sentences. During the interviews judges expressed that prisons' overcrowding is an *administrative problem* of National Administration of Prisons, they don't assuming any responsibility in relation with this (Assumption 3). Under these circumstances, it is quite impossible to see the courts as a possible factor to control the dynamic of prisons population. Despite this punitive discourse, judges are interested in finding appropriate methods to decrease offenders' risk (solving offenders' criminogenic needs) especially when they impose a noncustodial sanction (Objective 2, Assumption 3). It should be also noted that 14 subjects (28,6%) consider that *always* try not only to convict but also to find some solutions for offenders rehabilitation, while 15 judges (30, 6%) answered *sometime*. For offenders convicted to noncustodial sentences (on probation) judges try to impose some obligations in accordance with offenders' criminogenic needs such detox, attending structured programs for working with offenders developed by probation service etc. (Assumption 3).

6. Conclusions

Our study revealed that judges have a rational approach of sentencing policy, minimizing or even excluding the possibility to be influenced in their decisions by factors as mass media, public opinion or personal experiences. Also they are focused strictly on procedures from inside the court and don't take into account the institutional impact of sentences (prison overcrowding). Despite of this, judges are very interested to obtain information regarding offender's personality, level of education, professional background, psycho-social identity, being focused on external motivation of offender. When they impose noncustodial sentences (probation) judges are interested not only on punitive side of sentence but also take care about the offenders' rehabilitation imposing some obligations to be respected during probation term. Our study may represent a starting point for further explorations on judges' decisional mechanism as a premise of increasing sentences' predictability.

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